



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 1022 of 2012**

**MARTIN WALONG' MADIWA .....PLAINTIFF**

**VERSUS**

**VINCENT ODHIAMBO KAMENYA.....DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion application dated 21<sup>st</sup> January 2012 brought under the provisions of Article 40 of the Constitution, Section 13 and 19(3) of the Environment and Land Act, Section 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The application seeks the following orders:-

- 1) Spent.
- 2) That this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants, his Agents, Servants and/or Employees from selling, alienating, further constructing, interfering and/or in any way dealing with the Plaintiff's property being Plot Number 008 Dandora off Kangundo Road (Originally known as Plot Number 476) (hereinafter referred to as "the Suit Property") pending the inter-partes hearing and determination of this application.
- 3) That this honourable court be pleased to issue an order of Mandatory injunction compelling the Defendant, his Agents, Servants and/ or Employees to render vacant possession of the Suit Property pending the inter-partes hearing and determination of this Application .
- 4) That this honourable court be pleased to issue an order of temporary injunction restraining the Defendant, his Agents, Servants and/or Employees from selling, alienating, constructing, interfering and/or any way dealing with the Suit Property pending the inter-partes hearing and determination of the suit.
- 5) That costs be in the Cause.

The said application was premised upon the Supporting Affidavit of MARTIN WALONG' MADIWA in which he stated that he is the *bona fide* owner of the Suit Property and he produced a Letter of Allotment dated 2/7/09 from Nairobi City Council to attest to this. He additionally produced a Certificate of Ownership issued by Dandora Off Kangundo Road Self Help Group dated 18<sup>th</sup> September 2007. He further deponed that he bought the Suit Property located in Njiru Division for valuable consideration on 18/10/03. He further deponed that the suit Property was under the auspices of Dandora Off Kangundo

Road Self Help Group and that he had been a member since 2003. He further stated that he has faithfully paid the land rates, ground rent and premiums in respect of the Suit Property to the Nairobi City Council for more than eight years. He further swore that he was also faithfully paying for water, electricity, security and the general development of the estate for more than 8 years. He stated that he had not been able to obtain a Title to the Suit Property as yet as the Nairobi City Council had not yet issued him with a Beacon Certificate though the Suit Property had been surveyed and beacons positioned. He further deponed that on or about 31/3/12 the Defendant/Respondent and his servants trespassed and encroached on the Suit Property and commenced putting up a fence. He said he reported this to Obama Police Patrol Base and the Defendant was summoned to the Station and was ordered to pull down the fence which he complied. He further deponed that on or about September 2012 the Defendant/Respondent and his servant once again encroached on the Suit Property and Commenced construction thereon. He said that he then reported this matter to the Police, Obama Police Patrol base, the Chief, Njiru Location and the Director, City Housing Development Department and wrote letters to air his grievance but the Defendant/Respondent did not heed summons and continues to trespass and construct on the Suit Property and is on the verge of finalizing the ground floor of the building and is moving with lighting speed to frustrate the Plaintiffs' efforts to have him vacate the Suit Property.

The Application is contested. The Defendant/Respondent filed his Replying Affidavit sworn by him on 4<sup>th</sup> February 2012 in which he deponed that he has not trespassed on or constructed on the Suit Property. He swore that he does indeed own a plot within the development of Dandora Off Kangundo Road Self Help Group in the vicinity of the Suit Property but his plot is number 9 (Originally plot number 473). He produced his Certificate of Ownership dated 26/3/09. He stated that he bought his plot from one Peter Ochieng Owino for Ksh. 490,000/- in 2009. He further deponed that he had the plot allocation regularized by Nairobi City Council who issued him with a Letter of Allotment dated 2/7/09. He produced a copy of the said Allotment Letter. He further declared that as per the plans supplied by the Nairobi City Council, his plot, namely No. 9 (Originally plot No. 473) is at the extreme end of the line of a block of nine plots, while the Suit Property is adjacent to it. He further deponed that the Suit Property was originally number 474 not 476 and that Original plot No. 476 is plot No. 5 and not No. 8.

He annexed a copy of the plan. He further stated that the Plaintiff/Applicant is mistaken of the site and location of the Suit Property. He further declared that he was in the middle of constructing a unit on his premises and that he has spent close to Ksh. 3 million. He further stated that the restraining order issued against him would cause him irreparable harm.

I have heard the rival arguments made by both Counsels at the hearing of the application. What emerges from the documents filed and submissions made is the question whether the Defendant/Respondent is building on the Suit Property or Plot No. 9 (Originally plot No. 473). Is there really any encroachment on the Suit Property as alleged by the Plaintiff/Applicant? This question which has emerged in the Defendant/Respondents Replying Affidavit remains unanswered by the Plaintiff/Applicant. The Plaintiff/Applicant could have seized the opportunity to answer this question by way of further affidavit but he chose to remain silent. This court is therefore left with that unanswered question at this stage.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set in the case of **Giella Vs. Cassman Brown [1973] EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:-

***“The conditions for the grant of an interlocutory Injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.***

Has the Plaintiff/Applicant made out a prima facie case with a probability of Success? In the case of **Mrao v First American Bank of Kenya Limited and two others [2003] KLR 125**, a prima facie case was described as:-

***“a prima facie case in a civil application includes but is not confined to a genuine and arguable case”. It is a case which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”***

Has the Plaintiff/Applicant established a *prima facie* case with a probability of Success? As has been noted earlier, a question as to the true location of the Suit Property has emerged and remains at this juncture unanswered. The Plaintiff/applicant has laid his claim over the Suit Property and has produced Title documents to support his claim. At the same time, the Defendant/Respondent has also laid claim of plot No. 9 (Originally number 473) where he claims he is constructing a building. The Plaintiff/Applicant alleges that the Defendant/Respondent is constructing the building on the Suit Property. This is denied by the Defendant/Respondent who insists he is building on his own plot. This back and forth between the two parties cannot be resolved at this interlocutory stage and has to await the full trial where evidence will be adduced to enable the court to arrive at a just resolution of this issue. In the circumstances, the court finds that the Plaintiff/Applicant has not succeeded to establish a genuine and arguable case that he has a legal right that has been infringed. Hence, this court finds that he has not established a *prima facie* case with a probability of success. Arising from this finding, this court concludes that it is unnecessary to try and determine whether the other two pre-conditions set out on the ***Giella*** case have been fulfilled.

In addition, the court cannot issue an order of mandatory injunction at the interlocutory stage unless in very special circumstances. Refer to the case of ***Locabail International v Agro Export [1986] I ALLER 901*** in which it was stated as follows:-

***“A mandatory injunction ought not to be granted on an interlocutory application in the absence of Special circumstances and only in clear cases where the court thought that the matter ought to be decided at once, or where the injunction was directed at simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”***

This case is obviously not a clear case with the rival claims being made on both sides which have at this stage not been clearly determined. Accordingly, this court finds that this case is not suited to the grant of a mandatory injunction.

In conclusion, this court finds that the Plaintiff/Applicant has not succeeded in satisfying all the requirements for the grant of their prayers. Accordingly, their application is hereby dismissed. No order as to costs.

It is so ordered.

**SIGNED AND DELIVERED AT NAIROBI ON THE 10<sup>TH</sup> DAY OF MAY 2013**

**MARY M. GITUMBI**

**JUDGE**